United States Court of Appeals

for the Second Circuit

APPELLEE'S APPENDIX

75-1168

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P/S

To be argued by
JEREMY G. EPSTEIN

United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 75-1168

UNITED STATES OF AMERICA,

Appellee,

—v.—

JOHN FLYNN,

Defendant-Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF AND APPENDIX FOR THE UNITED STATES OF AMERICA

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BRIEF FOR THE UNITED STATES OF AMERICA

Preliminary Statement

John Flynn appeals from a judgment of conviction entered on April 18, 1975 in the United States District Court for the Southern District of New York, after a two day trial before the Honorable Inzer B. Wyatt, United States District Judge, and a jury.

Indictment 74 Cr. 1157, filed December 10, 1974, charged Flynn in Count One with conspiracy to obstruct justice in violation of 18 U.S.C. § 371 and in Count Two with the substantive offense of obstruction of justice in violation of 18 U.S.C. § 1503.

Trial commenced against Flynn on March 3, 1975 and concluded on March 4, when he was found not guilty on Count One and guilty on Count Two.* On April 18,

* Flynn chose to represent himself at trial and during all other proceedings in the District Court.

1975, Flynn was committed for a ninety-day period of observation and study pursuant to the provisions of 18 U.S.C. § 4208(c) and was sentenced to a provisional maximum term of imprisonment of five years pursuant to 18 U.S.C. § 4208(b).

Imposition of the sentence was stayed, and Flynn remains free on bail pending appeal.

Statement of Facts

The Government's Case

On February 2, 1972, Kathryn McGrath, who had just disembarked from a flight from Bogota, Columbia, was arrested at John F. Kennedy International Airport when Customs agents discovered ten pounds of cocaine beneath a false bottom in her suitcase. After her arrest, she was questioned by Customs agents and agreed to cooperate in apprehending the other members of the cocaine importation conspiracy. (Tr. 20-28).*

On February 4, 1972, McGrath testified before a Grand Jury sitting in the United States District Court for the Eastern District of New York. As a result of her testimony, Indictment 72 Cr. 146 was filed that day. It charged four individuals, McGrath, Mamie Elizabeth Lynch, Howard Warshaw, and Melba Kay Hanneson with importing and conspiring to import ten pounds of cocaine into the United States. By the date of the filing of the indictment, all four defendants had been arrested, and two, McGrath and Lynch, had been released on bail. On February 10, 1972, all defendants entered pleas of not guilty. Although McGrath initially entered a not guilty plea, it was understood from the outset that she would ultimately plead guilty and, if necessary, testify for the Government at trial and that her cooperation

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* "Tr." refers to the trial transcript; "GX" refers to Government exhibit; "Br." refers to appellant's brief.

would be brought to the attention of the trial judge at the time of her sentence. (GX 1, 2; Tr. 15-22, 28-31).

In mid-February 1972, McGrath was approached by Priscilla Witt, a friend of hers.* Witt told her that John Flynn, a mutual friend, was offering McGrath money if she would "control her testimony" at trial. McGrath informed Witt that she did not wish to discuss the case at that time. McGrath then contacted her lawyer, William Leibovitz, who in turn notified Nicholas Scoppetta, then an Assistant United States Attorney for the Southern District of New York. In the ensuing weeks McGrath conferred with Scoppetta and other members of the United States Attorney's office, during which time she agreed to meet with Flynn and tape record conversations between them. (Tr. 31-34).

On March 31, 1972, McGrath placed a telephone call to Flynn at his home. They agreed to meet at 2 P.M. that afternoon on the corner of Houston and Thompson Streets in Manhattan. Prior to meeting Flynn, McGrath was outfitted with a transmitting device and was then followed by agents carrying a receiver and tape recorder. (Tr. 34-40, 97-98).

McGrath met Flynn at the appointed place, and they then entered Rocco's Restaurant on Thompson Street. In the restaurant, the two began to discuss the pending narcotics indictment.** Flynn asked McGrath who her lawyer was and how much he was charging her. She

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* Witt was named as an unindicted co-conspirator in the instant indictment.

** The entire conversation in the restaurant was tape recorded. The recording was introduced in evidence as Government's Exhibit 5, and the transcript of the recording as Government's Exhibit 5A.

replied that he was charging $5,000 of which she had already paid $1,200. (GX 5A at 5). Flynn asked McGrath if she was going to turn "state's evidence". When she equivocated, he informed her that "you're their, their whole case against the others, you know your testimony against the other three in the conspiracy." (*Id.* at 9). He further informed her that "if you refuse to testify then, uh, the others really would be innocent of that particular charge." (*Id.* at 10).

Once he had demonstrated to McGrath the significance of her testimony, Flynn made clear the purpose of their meeting in the following exchange:

> "McGrath: So there was three thousand originally offered to me to keep my trap shut.
>
> Flynn: Yeah.
>
> McGrath: But it wasn't you.
>
> Flynn: Uh I'll finish it outside of—anyway it was like well the thing is basically either you would [unintell.] not to cooperate with Boyd, or not to turn state's evidence; I just backed you with everything I had, then.
>
> McGrath: You? Why?
>
> Flynn: That's the way I feel about it I guess I don't want to see everybody go to jail." (*Id.* at 12).

Flynn then proceeded to outline a plan whereby he would approach the lawyers for the remaining three defendants and seek to persuade them either to represent McGrath or obtain another lawyer who would represent her without charge to her.* This offer of $3,800 in free

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* Flynn told McGrath that it was necessary that she discharge Leibovitz, her current lawyer, because he was obviously cooperating with Edward Boyd, the Eastern District prosecutor.

legal services was contingent on her refusing to testify for the Government. As Flynn stated: "I mean if, if you were to agree not to turn state's evidence [unintell.] they provide you with a lawyer, I think that would be worth five thousand dollars. I think, in other words, maybe the twelve would be lost to this guy." (*Id.* at 26).

As the conversation came to a close, Flynn promised to obtain money from McGrath if she ceased cooperating with the Government. He stated, "well I think you should not testify . . . but I think you should see what you can get in the way of financial help for support." (*Id.* at 31). Flynn promised to seek financial assistance both from the lawyers for the remaining defendants as well as from other, undisclosed sources: "I'd like to gauge from, not only the lawyers, but from other people too you know like what you may have answered that might how much financing . . . can be gathered up." (*Id.* at 34). With that understanding, they concluded the meeting. (Tr. 40-44, 55-59, 98-100).

On April 3, 1972, McGrath placed a phone call to Flynn, and the ensuing conversation was tape recorded. (GX 6, 6A). During the conversation, Flynn stated, "So I asked Elizabeth to, uh, you know ask Elliot to tell the other lawyers, or to ask the other lawyers, uh, you know, what can be gotten, you know, what assistance or aid can be gotten you know, if you agreed not to testify." (GX 6A at 2).* Flynn stated further, however, that he had not as yet received any response to his proposal from any of the lawyers. (Tr. 59-62).

On the following day, April 4, 1972, McGrath ~~placed~~ entered a plea of guilty to the conspiracy count of 72 Cr.

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* McGrath identified "Elizabeth" as Mamie Elizabeth Lynch, a co-defendant in the Eastern District indictment, and "Elliot" as Elliot Taikeff, her lawyer. (Tr. 62).

146 in the Eastern District. That afternoon, she placed a phone call to Flynn, which was again tape recorded. (GX 7, 7A). During the conversation Flynn asked McGrath to meet with him, stating that he had a "scheme" to present to her. He thereafter elaborated on the scheme: "A scheme yah that would involve your lawyer also, you know. You know for paying the rest of the money if you were interested in doing certain things, etcetera." (GX 7A at 4). They agreed to arrange a meeting in the near future. (Tr. 62-65, 68).

A meeting was finally arranged for April 6, 1972 at the corner of Sixth Avenue and Tenth Street in Manhattan. After the two met there, they proceeded to Washington Square Park, where they had a conversation.* Flynn repeated to McGrath that there was money available if she either testified favorably for her co-defendants or if she failed to appear as a witness at the trial. In response to McGrath's inquiries, however, Flynn refused to identify the source of the funds. (Tr. 69-73).**

On the following day, April 7, 1972, McGrath placed another call to Flynn, which was again recorded. (GX 10, 10A). The conversation was devoted in large part to Flynn's effort to secure from McGrath a fraudulently obtained welfare identification card in her possession and two welfare checks she had obtained through use of the card. (Tr. 77-87). McGrath, however, refused to give to

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* Although McGrath was equipped with a transmitting device during this meeting and a recording was made of the conversation, the recording was of such poor quality that it was not played for the jury. (Tr. 100-104).

** McGrath telephoned Flynn that same evening, and the proposed bribe was again discussed in veiled terms. (GX 9, 9A).

Flynn either the card or the checks.* Flynn, angered at her lack of cooperation, effectively withdrew the offer of the $3,800 bribe in the following exchange:

> "Flynn: . . . You know I wanted just to see if we could trust one another.
>
> McGrath: Um
>
> Flynn: And apparently, I ain't seeing it, you know. And without that, what the fuck is the use of going into something big? When we can't even handle, with trust, something small.
>
> McGrath: Um
>
> Flynn: And you know 'big' is like three eight or whatever the number is you know." (GX 10A at 14-15).

McGrath had no further conversations or meetings with Flynn regarding the offer of a bribe. (Tr. 87). The remaining three defendants in 72 Cr. 146 entered pleas of guilty in June and August, 1972. They subsequently agreed to cooperate with the Government and testified in the Grand Jury. As a result of their testimony, and further testimony by McGrath, a second indictment was returned in the Eastern District, 72 Cr. 1184, which named eleven additional defendants and which described a narcotics importation conspiracy of longer duration than that embraced in the first indictment. (GX 2; Tr. 21-24).

On October 16, 1972, agents of the Bureau of Customs, acting pursuant to an arrest warrant issued in the Eastern District of New York, arrested Flynn in his

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* Flynn, while employed in the New York State Welfare Department, contrived to put several people, including McGrath, on the welfare rolls. In exchange for this act of generosity, these "welfare recipients" would give Flynn one-half of their monthly stipend. (Tr. 83-87; GX 10A, *passim*).

apartment in Queens. After the agents identified themselves at the door, Flynn ran into his bedroom and reached into his bureau drawer. Agent Gerard Whitmore, thinking Flynn was reaching for a weapon, stopped Flynn while his hand was still in the drawer. When the agents searched the drawer, they found $3,600 in cash and four savings bank passbooks, all of which Flynn acknowledged were his. One passbook (GX 11) reflected withdrawals of $2,800 between February 11, 1972 and March 13, 1972; another (GX 13) reflected withdrawals of $3,500 between February 2, 1972 and March 29, 1972. (Tr. 106-111; Tr. of February 28, 1975, 6-14).*

The Defense Case

Flynn testified in his own behalf. He admitted that shortly after the four defendants in 72 Cr. 146 were arrested, a meeting of their friends was held in Brooklyn which Flynn attended. At that meeting various plans for helping the defendants were discussed. (Tr. 122-123).

After that meeting in February 1972, Flynn embarked on a plan of his own; he decided that "the only moral thing for me to do was to try to be of assistance to each person as long as no person screwed the other three." (Tr. 124). He therefore tried to see to it that the four defendants "stuck together". (*Id.*).

In mid-March 1972 Flynn conferred with Edmund and Nancy Rosner, lawyers for Warshaw and Hanneson. The Rosners told Flynn that they suspected that McGrath would be a Government witness, but were not certain. Flynn claimed that he was also cautioned by Nancy Rosner that it constituted obstruction of justice to dissuade a witness from testifying. She therefore cautioned him not to contact McGrath. (Tr. 125-126).

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* Prior to trial Flynn moved to suppress the $3,600 in cash. Judge Wyatt denied the motion on February 28, 1972 after a brief evidentiary hearing.

Flynn claimed he did not initiate the first meeting with McGrath and insisted that she (and the Government) "came after" him. (Tr. 126).

On cross-examination Flynn was asked about the taped conversation of March 31, 1972 at Rocco's Restaurant. He stated that he "neither affirmed nor denied" that his voice was on the tape, although he acknowledged meeting with McGrath on that day. He conceded that he asked McGrath whether she was going to "turn state's evidence", but denied offering her any money. He also denied advising her not to testify for the Government. (Tr. 139-142).

Flynn further denied proposing a scheme to pay McGrath's lawyer the balance of her legal fee. He testified that "[n]o one had any cash. There is no cash or money involved in this at all. It is all abstract head money." (Tr. 149). When he was reminded that his bankbooks showed withdrawals totalling $6,300 in February and March, 1972, he declined to have his recollection refreshed further. (Tr. 149-150).

ARGUMENT

POINT I

The Government's evidence was sufficient to establish a violation of Title 18, United States Code, Section 1503.

Flynn argues (Br. 22, 25-27) that the Government's proof was insufficient to establish his guilt of the crime of obstruction of justice.* We submit that the evidence

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* What follows is an attempt to respond to those portions of appellant's brief that can be deemed legal argument, however submerged those arguments are in invective.

outlined more fully in the "Statement of Facts," *supra*, demonstrates his guilt beyond any conceivable question.

The evidence showed that in February 1972, Kathryn McGrath, the Government's principal witness, was approached by Priscilla Witt and told that Flynn was offering McGrath money if she would "control her testimony" to favor the other three defendants in Eastern District Indictment 72 Cr. 146. When McGrath met Flynn on March 31, 1972 at Rocco's Restaurant on Thompson Street, he informed her that she was the prosecution's entire case against the remaining defendants and that, if she would refuse to testify, they would be acquitted. (GX 5A at 9-10). When McGrath asked Flynn whether "there was three thousand originally offered to me to keep my trap shut", he replied, "yeah". (*Id.* at 12). Although Flynn denied being the source of the money, he admitted participating in this scheme because "I guess I don't want to see everybody go to jail". (*Id.*). Later in that conversation, he offered to find McGrath another lawyer, whose services would be paid for by the remaining defendants; however, this lawyer would only be provided her if she "were to agree not to turn state's evidence". (*Id.* at 26). At the close of their conversation, Flynn told McGrath that "I think you should not testify . . . but I think you should see what you can get in the way of financial help for support". (*Id.* at 31).

In a telephone conversation with McGrath three days later, Flynn said that he had asked one of the other defendants, Mamie Elizabeth Lynch, to ask her lawyer "what assistance or aid can be gotten you know, *if you agreed not to testify*". (GX 6A at 2) (Italics supplied). Several days later, when Flynn met McGrath in Washington Square Park in Manhattan, he again told her that there was money available for her either if she altered her testimony in favor of her co-defendants or if she failed to

appear at the trial, but refused to identify the source of the funds. (Tr. 69-73).*

Flynn's offer of $3,800 in legal services, and his endeavors to persuade McGrath not to testify for the Government, clearly constituted an endeavor to influence a witness within the meaning of 18 U.S.C. § 1503. Since *United States* v. *Russell*, 255 U.S. 138 (1921), the meaning of endeavor has not been open to serious dispute. In that case the defendant approached the wife of a prospective juror and inquired about the juror's attitude regarding the outcome of a pending criminal case; he further informed the wife that he and others were not interested in paying a juror money unless they could be assured of a vote in favor of acquittal. There was no evidence that this offer was ever communicated to the husband; that

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* Flynn argues that "the tapes, the prime evidence, cannot support the government's constant reference to a $3,800 bribe offer. . . . The $3,800 in question is an abstract product of subtraction. There never was any $3,800 in real money, nor was there any bribe offer of any amount". (Br. 25). He thereby overlooks, or chooses to ignore, two remarks he himself made to McGrath during the course of their conversations. During their meeting on March 31, 1972, Flynn asked McGrath how much her lawyer was charging her; she answered that he was charging $5,000, of which she had already paid $1,200. (GX 5A at 5). When Flynn later in the conversation proposed providing McGrath with a free lawyer if she would refuse to cooperate with the Government, he said: "I mean if, if you were to agree not to turn state's evidence [unintell.] they provide you with a lawyer. I think that would be worth five thousand dollars. I think, in other words, maybe the twelve would be lost to this guy". (*Id.* at 26).

Another reference by Flynn to the $3,800 bribe appears in the telephone conversation of April 7, 1972. During that conversation, Flynn withdrew his bribe offer to McGrath because she would not pay Flynn the proceeds of certain fraudulently obtained welfare checks. He told her that there was no point in their "going into something big" when they could not agree on something small. He then added, "[a]nd you know big is like three eight or whatever the number is you know". (GX 10A at 14-15).

he would have been qualified to serve as a juror; or that he was actually empaneled. It was therefore argued that the defendant's conduct did not rise to a violation of the statute. The Supreme Court disagreed; it defined endeavor as "any effort or essay to accomplish the evil purpose that the section was enacted to prevent. . . . The section, however, is not directed at success in corrupting a juror but at the 'endeavor' to do so. Experimental approaches to the corruption of a juror are the 'endeavor' of the section". 255 U.S. at 143. This Court has explicitly followed *Russell*. *United States* v. *Cioffi*, 493 F.2d 1111 (2d Cir. 1974); *United States* v. *Knohl*, 379 F.2d 427, 443 (2d Cir.), *cert. denied*, 389 U.S. 973 (1967). See also *United States* v. *Rosner*, 352 F. Supp. 915, 917-919 (S.D.N.Y. 1972); *United States* v. *Solow*, 138 F. Supp. 812, 814 (S.D.N.Y. 1956) (Weinfeld, J.).

Flynn's activities unquestionably amounted to a corrupt "endeavor" to influence McGrath's testimony. In *United States* v. *Cioffi*, *supra*, this Court held that merely advising a witness to plead his Fifth Amendment privilege could be actionable under § 1503 if the advice was given for a corrupt purpose. Flynn, of course, did far more than advise McGrath to invoke the Fifth Amendment; he advised her to stop cooperating with the prosecution and, at their meeting of April 6 in Washington Square Park, also suggested that she fail to appear at the trial. See *United States* v. *Marionneaux*, 514 F.2d 1244, 1249 (5th Cir. 1975). In *Anderson* v. *United States*, 215 F.2d 84 (6th Cir.), *cert. denied*, 348 U.S. 888 (1954), it was held that "[t]here can be no reasonable doubt that an effort to alter testimony of witnesses for a corrupt purpose would plainly be an endeavor to impede the due administration of justice". Nor can there be any doubt that Flynn's purpose here was corrupt. As he admitted during his trial testimony, he was endeavoring to see to it that "no person screwed the other three" defendants.

(Tr. 124). The manifest purpose of his dealings with McGrath was to prevent her from testifying against the remaining defendants and thereby thwart the prosecution.

Broadbent v. *United States*, 149 F.2d 580 (10th Cir. 1945), cited by this Court in *Cioffi*, is factually indistinguishable from the instant case. There the defendant approached a prospective Government witness in a criminal prosecution against one Follis Petty. The defendant stated to the witness that she came in Petty's behalf and that the witness would be given $100 per month and a home if the witness would "be on their side". The defendant also also asked whether the witness had been subpoenaed and told her to see Petty's lawyers, who wanted to know the substance of her testimony. The Tenth Circuit found that conduct clearly violative of the statute. See also *United States* v. *Polakoff*, 121 F.2d 333 (2d Cir.), *cert. denied*, 314 U.S. 626 (1941); *Bosselman* v. *United States*, 239 F. 82 (2d Cir. 1917).*

POINT II

The introduction of tape recorded conversations in which Flynn participated was in all respects proper.

Flynn advances three arguments concerning the Government's introduction of tape recordings of conversations between him and Kathryn McGrath. First, he argues that the recording of his conversations violated his constitutional rights and "constituted an unwarranted

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* Flynn cites several portions in McGrath's testimony that allegedly suggest uncertainty or equivocation in describing his bribe offer. (Br. 24-26). Even assuming that her parenthetical remarks have such a significance, Flynn ignores those passages in her testimony that were declarative and unequivocal. (Tr. 32, 57-58, 72, 86). He also ignores the evidence of the tape recordings, in which he exhibits not the slightest hesitation in proffering a bribe.

invasion of [his] privacy". (Br. 10). Second, he argues that the tape of Flynn's conversation with McGrath at Rocco's Restaurant (GX 5) and the transcript made from it (GX 5A) should not have been admitted because the tape was inaudible. (Br. 24). Third, he argues that the employment of headphones for the Court, parties, and jury deprived him of the "public trial" guaranteed by the Sixth Amendment. (Br. 24).

In regard to the first of these arguments, it is now well settled that so long as one party consents to the recording of a conversation, there is no constitutional bar to its recording and subsequent introduction in evidence against another party to the conversation. In *Lopez* v. *United States*, 373 U.S. 427 (1963) a claim identical to Flynn's was considered and rejected by the Supreme Court:

> "The only evidence obtained consisted of statements made by Lopez to Davis [a government agent], statements which Lopez knew full well could be used against him by Davis if he wished. We decline to hold that whenever an offer of a bribe is made in private, and the offeree does not intend to accept, that offer is a constitutionally protected communication." 373 U.S. at 438.

The Court added that

> "[t]he Government did not use an electronic device to listen in on conversations it could not otherwise have heard. Instead, the device was used only to obtain the most reliable evidence possible of a conversation in which the Government's own agent was a participant and which that agent was fully entitled to disclose." 373 U.S. at 439.

See also *United States* v. *White*, 401 U.S. 745 (1971); *Hoffa* v. *United States*, 385 U.S. 293, 302-03 (1966);

United States v. *Gartner*, 518 F.2d 633 (2d Cir. 1975); *United States* v. *Bonanno*, 487 F.2d 654, 657-58 (2d Cir. 1973); *United States* v. *Kaufer*, 406 F.2d 550 (2d Cir.), *aff'd*, 394 U.S. 458 (1969).

Flynn's second argument regarding tape recordings is that Government's Exhibit 5, which recorded his conversation with McGrath at Rocco's Restaurant on March 31, was inaudible and the Government's transcript thereof inaccurate.* The record clearly demonstrates that at the first pretrial conference held in this case, on January 7, 1975, the Government advised Flynn that it intended to introduce tape recordings in evidence. (Tr. of January 7, 1975, at 13). The matter arose during the course of Judge Wyatt's detailed *voir dire* of the defendant on the subject of his refusal to accept the assistance of counsel. The prosecutor pointed out that it was the practice in the Southern District for the parties to listen to the tapes in advance of trial and agree on a single transcript to be submitted to the jury. See *United States* v. *Bryant*, 480 F.2d 785, 789-791 (2d Cir. 1973); *United States* v. *Carson*, 464 F.2d 424, 436-437 (2d Cir.), *cert. denied*, 409 U.S. 949 (1972). It was also suggested that Flynn might find the assistance of counsel useful in this aspect of pretrial preparation. Flynn refused this suggestion.

On February 12, 1975, Flynn was advised by letter that the tapes and draft transcripts were available for his perusal. On February 18, 1975, the tape recordings were played for him and he was given copies of the tapes as well as proposed drafts of the transcripts. (Tr. of February 28, 1975, at 2). On February 28, 1975, during a pretrial hearing, Flynn was asked whether, in accordance with *Bryant*, he wished to stipulate to the

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* Flynn does not dispute the audibility of the other tapes played to the jury, all of which recorded telephone conversations. (Br. 24).

accuracy of the Government's transcripts or provide an alternative version for the jury. Flynn replied that he would not concede that the voice on the transcript was his and would therefore neither stipulate nor provide an alternative version. (Tr. of February 28, 1975, at 28-30).

When Government's Exhibit 5 was offered at the trial, Flynn raised no objection to its audibility, except for a passing reference in his summation (Tr. 175), and he is therefore precluded from raising this issue on appeal. The posture of the case is identical to that of *Bryant*, where no question of audibility was raised prior to the playing of the tape to the jury and thus there was no occasion for an audibility hearing. Because the issue was raised for the first time on appeal, this Court noted that the appellant was not entitled as a matter of right to raise it. *Supra*, 480 F.2d at 789.

But even assuming *arguendo* that this issue can be raised without a proper objection having been made below, the District Court clearly did not err in receiving the tape in evidence. The prevailing rule in this Circuit is that a recording may be admitted "unless the unintelligible portions are so substantial as to render the recording as a whole untrustworthy". *United States* v. *Bryant*, *supra*, at 790; *Monroe* v. *United States*, 234 F.2d 49, 55 (D.C. Cir.), *cert. denied*, 352 U.S. 873 (1956). We invite the Court's review of the tape and transcript, GX 5 and 5A, and submit that no one could reasonably conclude that the unintelligible portions render the remainder untrustworthy.*

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* In *United States* v. *Hall*, 342 F.2d 849, 853 (4th Cir.), *cert. denied*, 382 U.S. 812 (1965), a tape 75% audible was held properly admitted, and in *Addison* v. *United States*, 317 F.2d 808, 815 (5th Cir. 1963), *cert. denied*, 376 U.S. 905 (1964), a similar conclusion was reached regarding a tape that was only 50% audible. The imperfections in the tape in question do not even approach those of *Hall* or *Addison*, and we submit that it was properly admitted in evidence.

Flynn also disputes the accuracy of the transcript submitted as Government's Exhibit 5A. (Br. 24). As noted earlier, although he was given the tapes and the draft transcripts two weeks prior to trial, he refused to submit an alternative version. Given his refusal to comply with the procedure prescribed in *Bryant* and *Carson*, and his failure to object to the transcript when offered, we submit that he cannot now fault the procedure Judge Wyatt followed. Before each tape was offered in evidence McGrath, a party to the conversations, testified that she had compared the tape with the transcript and found the latter to be accurate. (Tr. 36, 42, 61, 65, 75, 78). Moreover, on two occasions, before the first tape was played and in his charge, Judge Wyatt reminded the jury that the transcripts were not evidence and were to be deemed only aids in their comprehension of the tapes. (Tr. 36-37, 203).*

Finally, Flynn claims that the use of headsets deprived him of a public trial as guaranteed by the Sixth Amendment. Here too, Flynn failed to voice any objection at trial to the use of headsets, and he may, therefore, not raise the point here in the absence of plain error. *United States* v. *Indiviglio*, 352 F.2d 276 (2d Cir. 1965), *cert. denied*, 383 U.S. 907 (1966).** In any case, this argument has been uniformly rejected. *D'Aquino* v. *United States*, 192 F.2d 338, 365 (9th Cir. 1951), *cert. denied*, 343 U.S. 935 (1952);*** *Gillars* v.

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* This procedure was explicitly sanctioned in *Bryant*, 480 F.2d at 791.

** Had Flynn objected at the trial, the defect he perceives could have been easily remedied, for the tape recorder used by the Government contained a loudspeaker system that could have been employed simultaneously with the headsets. There were also sufficient additional headsets available for the use of the spectators.

*** The Ninth Circuit dealt with an identical argument in *D'Aquino* in the following fashion:

[Footnote continued on following page]

United States, 182 F.2d 962, 977 (D.C. Cir. 1950); *United States* v. *Kohne*, 358 F. Supp. 1053, 1063 (W.D. Pa.), *aff'd*, 485 F.2d 679, 680, 681 and 487 F.2d 1394, 1395, 1396 (3d Cir. 1973), *cert. denied*, 417 U.S. 918 (1974).

POINT III

The $3600 in cash found in Flynn's apartment on October 16, 1972 was properly seized and properly admitted into evidence.

Flynn advances two arguments concerning the $3600 in cash that was seized in his apartment on October 16, 1972 at the time of his arrest on an Eastern District warrant. First, he claims that the money was the fruit of an improper search and seizure (Br. 12) and second, that it was improperly received in evidence because irrelevant to the crime of which he was charged. (Br. 23).

Prior to trial, Flynn moved to suppress the $3600, and Judge Wyatt conducted a brief evidentiary hearing on February 28, 1975. At the hearing it was established that, on October 13, 1972, Magistrate Max Schiffman of the United States District Court for the Eastern District of New York ordered the issuance of a warrant for Flynn's arrest. The warrant was based on an affidavit of Special Agent William Schnakenberg of the Bureau of Customs charging Flynn with participation in a conspiracy to import large quantities of cocaine from Bogota, Colombia into the United States. (February 28, 1975

"Essentially the records were exhibits and we think that appellant might as logically argue that she was denied a public trial because certain exhibits such as photographs, samples of handwriting, etc., although examined by the parties and by the jury were not passed around to the spectators in the courtroom. We think that the contention as to lack of public trial is wholly without merit." 192 F.2d at 365.

GX 1). Accordingly, on October 16, 1975 two Customs agents went to Flynn's apartment in Queens, accompanied by the building superintendent. (Tr. of February 28, 1975, at 7-9). Flynn opened the door at the superintendant's behest and was immediately placed under arrest by the agents, who also informed him that they possessed an arrest warrant. Because Flynn was dressed only in his underwear, he asked if he could dress himself and the agents agreed. He then ran into the bedroom, followed by Agent Gerard Whitmore. Whitmore saw Flynn open a drawer of his dresser and reach for something inside. Whitmore then drew his gun and told Flynn not to remove anything from the drawer. When he came closer to the drawer, Whitmore observed a quantity of bills, which he seized and retained as evidence. The bills were later found to total $3600. (Tr. of February 28, 1975 at 9-12).*

At the conclusion of the hearing, Judge Wyatt refused to suppress the $3600, reasoning that because the money was within the area of Flynn's immediate control, it was seized incident to lawful arrest. Alternatively, he found that the money was in the plain view of Agent Whitmore and properly seized for that reason. (Tr. of February 28, 1975, at 22-23).

We submit that Judge Wyatt's analysis was clearly correct and that the search of Flynn's dresser drawer, concededly without a warrant, could be justified under either of two recognized exceptions to the warrant requirement: first, as a search incident to a lawful arrest, and second as a seizure of items in "plain view" of the arresting officer.

The classic formulation of the "search incident" theory is found in *Chimel* v. *California*, 395 U.S. 752, 762-763 (1969):

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*The only testimony at the hearing was offered by Agent Whitmore. Flynn did not testify.

> "When an arrest is made, it is reasonable for the arresting officer to search the person arrested in order to remove any weapons that the latter might seek to use in order to resist arrest or effect his escape. Otherwise, the officer's safety might well be endangered, and the arrest itself frustrated. In addition, it is entirely reasonable for the arresting officer to search for and seize any evidence on the arrestee's person in order to prevent its concealment or destruction. *And the area into which an arrestee might reach in order to grab a weapon or evidentiary items must, of course, be governed by a like rule. A gun on a table or in a drawer in front of one who is arrested can be as dangerous to the arresting officer as one concealed in the clothing of the person arrested.* There is ample justification, therefore, for a search of the arrestee's person and the 'area within his immediate control'—construing that phrase to mean the area from within which he might gain possession of a weapon or destructible evidence." (Italics supplied).

Chimel clearly justifies the search conducted by the agent in the instant case; indeed, the italicized example fits the facts of the case at bar precisely. It was entirely reasonable for Agent Whitmore to suspect that the defendant was reaching for a gun in the drawer, and the actions he took when he saw Flynn reach for the drawer demonstrate this apprehension. The justification for permitting the search of an area within the arrestee's grasp is twofold: to prevent the destruction or concealment of evidence and to afford the arresting officer protection against the sudden use of a weapon. The open dresser drawer was clearly within Flynn's immediate control, and the agents were thus justified in searching it. *See United States* v. *Mapp*, 476 F.2d 67, 81, n. 15 (2d Cir. 1973); *United States* v. *Manarite*, 448 F.2d 583, 593 (2d Cir.), *cert. denied*, 404 U.S. 947 (1971).

Alternatively, the search can be justified because once Flynn opened the drawer the money was in "plain view" of Agent Whitmore. In *Coolidge* v. *New Hampshire*, 403 U.S. 443, 465-66, n. 24 (1971), the Supreme Court stated that, "[w]here . . . the arresting officer inadvertently comes within plain view of a piece of evidence, not concealed, although outside of the area under the immediate control over the arrestee, the officer may seize it, so long as the plain view was obtained in the course of an appropriately limited search of the arrestee". The *Coolidge* doctrine has found frequent application in this Court. *United States* v. *Lisznyai*, 470 F.2d 707 (2d Cir. 1972), *cert. denied*, 410 U.S. 987 (1973); *United States* v. *Candella*, 469 F.2d 173 (2d Cir. 1972); *United States* v. *Titus*, 445 F.2d 577 (2d Cir.), *cert. denied*, 404 U.S. 957 (1971). Once the drawer was opened by Flynn, the money was within the plain view of the arresting officer and subject to seizure under *Coolidge*.

Flynn also contends that Judge Wyatt erred in admitting the $3600 into evidence at the trial. He argues that since the bribe offer to McGrath terminated on April 7, 1972, the $3600 recovered in October 1972 had no probative value. During his trial testimony, Flynn insisted that no one possessed the funds to underwrite a bribe to McGrath:

> "A. There was no scheme involving her lawyer. I never knew her lawyer. I never met him. There was no money involved in it. No one had any cash.
>
> Q. What was the last remark?
>
> A. No one had any cash. There was no cash or money involved in this at all. It is all abstract head money." (Tr. 149).

Flynn renews this claim at page 25 of his brief: "The $3800 in question is an abstract product of subtraction. There never was any $3800 in real money, nor was there any bribe offer of any amount".

The relevance of the $3600 in cash is easily demonstrated. That money, as well as the bankbooks showing withdrawals of $6300 for February and March 1972, demonstrates that Flynn indeed possessed the wherewithal to make good his offer of financial assistance to McGrath, and that he possessed it in ready cash. The $3600 belies Flynn's testimony that the money offered McGrath was a mere abstraction. We submit that the jury was entitled to learn that Flynn's offer of $3800 was not an empty inducement but a bribe capable of being realized.*

POINT IV

There is no evidence whatsoever that Flynn was entrapped.

Flynn claims at several junctures in his brief, that he was entrapped by Government prosecutors. (Br. 9, 21, 31). During his direct examination at trial, he made a similar contention. (Tr. 126). He thereafter did not request an entrapment charge, and none was included in Judge Wyatt's original charge to the jury. After an hour's deliberation, the jury submitted a note asking for a definition of entrapment. (Tr. 211). Judge Wyatt, although stating that he had previously determined that Flynn was not entitled to an entrapment charge (Tr. 212), then concluded that the issue should be presented to the jury. (Tr. 215). The Government did not object to the submission of an entrapment charge, and Judge Wyatt thereafter charged the jury on the question. (Tr. 216-219). The jury then resumed its deliberations and returned its verdict eight minutes later. (Tr. 219).

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* Flynn also complains that the Government unjustifiably withheld the $3600 during the pendency of these proceedings. This Court should be advised that the money was returned to Flynn on May 23, 1975.

We submit that Flynn was not even entitled to have the question of entrapment presented to the jury; once it was presented, he cannot dispute the jury's verdict. It is settled law in this Circuit that an entrapment defense triggers a bifurcated inquiry: The defendant is required to show some evidence of inducement, and the Government is then compelled to prove the defendant's predisposition to commit the crime charged. *United States* v. *Anglada*, Dkt. No. 75-1226 (2d Cir., Oct. 16, 1975); *United States* v. *Riley*, 363 F.2d 955 (2d Cir. 1966). Here, there was no evidence of inducement presented by Flynn. The only evidence regarding the initiation of McGrath's meetings with Flynn was that McGrath was approached by Priscilla Witt, who communicated Flynn's offer of money. McGrath then contacted her lawyer, who in turn notified members of the United States Attorney's Office for the Southern District of New York. After meeting with various Assistant United States Attorneys, McGrath agreed to respond to Flynn's offer and to tape-record conversations between them. (Tr. 31-34).

In *Lopez* v. *United States*, 373 U.S. 427 (1963), it was held that "[t]he conduct with which the defense of entrapment is concerned is the *manufacturing* of crime by law enforcement officials and their agents. . . . Thus before the issue of entrapment can fairly be said to have been presented in a criminal prosecution there must have been at least some showing of the kind of conduct by government agents which may well have induced the accused to commit the crime charged". 373 U.S. at 434-435 (Italics in original). In *United States* v. *Russell*, 411 U.S. 423 (1973), the Court stated that "the fact that officers or employees of the Government merely afford opportunities or facilities for the commission of the offense does not defeat the prosecution". 411 U.S. at 435. Here, the crime in question was contrived and manufactured by no one but Flynn; the Government did nothing more than make

McGrath, the object of Flynn's attempted bribe, available to him.*

POINT V

The trial court's charge on the defendant's credibility was proper.

During his charge, Judge Wyatt instructed the jury as follows regarding the evaluation of Flynn's testimony:

> "Now the law permits, but does not require, a defendant to testify in his own behalf. The defendant here, Mr. Flynn, has taken this witness stand and has testified. Obviously a defendant has a deep, personal interest in the result of his prosecution. In fact, it seems clear that he has the greatest interest of all. Interest creates a motive for false testimony. The greater the interest the stronger the motive. And the interest of a defendant in the result of his trial is of a character possessed by no other witness.
>
> In appraising the credibility of the defendant you may take the fact of interest into consideration. However, it by no means follows that simply because a person has a vital interest in the result that he is not capable of giving a straightforward and truthful account of events. It is for you the jurors to decide to what extent, if at all, interest has affected or colored his testimony." (Tr. 202-203).

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* Flynn also claims (Br. 9) that the decision to "entrap" him was made by the Eastern District prosecutor, Edward J. Boyd V, after Flynn appeared at several bail hearings on behalf of one of McGrath's co-defendants in 72 Cr. 146 (E.D.N.Y.). There is no evidence in the record to support this claim. The record, furthermore, discloses that the investigation into Flynn's attempts to bribe McGrath was conducted solely by members of the United States Attorney's Office for the Southern District.

Flynn claims this instruction to have been improper, given his unique role as defense counsel and sole defense witness. (Br. 28-29). The argument is meritless.

The instruction given by Judge Wyatt has been recognized as proper since *Reagan* v. *United States*, 157 U.S. 301, 304-311 (1895). This Court has approved similarly worded instructions in *United States* v. *Sullivan*, 329 F.2d 755 (2d Cir.), *cert. denied*, 377 U.S. 1005 (1964) and *United States* v. *Paccione*, 224 F.2d 801 (2d Cir.), *cert. denied*, 350 U.S. 896 (1955). Indeed, it is clear that Judge Wyatt's instruction was more favorable to the defendant than that which this Court approved in *Sullivan*, *supra*, 329 F.2d at 756-757. Flynn deliberately chose his dual role as counsel and defendant, after careful admonition by Judge Wyatt. This role does not, we submit, entitle his testimony to be given greater consideration than that of any other defendant.*

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* Flynn advances several additional arguments in passing. He claims prejudice in the fixing of $15,000 bail by Magistrate Schiffman after his arrest in the Eastern District on October 16, 1972. (Br. 12, 15). If there was any infirmity, constitutional or otherwise, in this bail determination, its relevance to the case at bar is nowhere explained.

Flynn also contends that the conspiracy charge contained in the instant indictment was brought in bad faith. (Br. 20). Even though he was acquitted on this count, the Government submits it was thoroughly justified in bringing a conspiracy charge. The one named co-conspirator was Priscilla Witt, who first communicated Flynn's bribe offer to McGrath, as McGrath herself testified. (Tr. 31-34). This act was sufficient to establish her participation in the conspiracy, and Judge Wyatt permitted the conspiracy count to go to the jury.

Flynn also objects to references in the prosecutor's opening and summation to the importance of the obstruction of justice statute and the purpose of prosecutions brought under it. (Br. 30). It is worth noting, in that regard, that in his own summation, Flynn explicitly endorsed the prosecutor's characterization of the seriousness of the charge. (Tr. 178). We further submit that the remarks constituted fair comment on Flynn's criminal acts, which are properly regarded as exceptionally serious.

CONCLUSION

The judgment of conviction should be affirmed.

Respectfully submitted,

THOMAS J. CAHILL,
United States Attorney for the Southern District of New York, Attorney for the United States of America.

JEREMY G. EPSTEIN,
LAWRENCE B. PEDOWITZ,
Assistant United States Attorneys, Of Counsel.

APPENDIX

United States District Court

SOUTHERN DISTRICT OF NEW YORK

74 Crim. 1157

UNITED STATES OF AMERICA

—v.—

JOHN FLYNN,

Defendant.

Docket Entries

Date	*Proceedings*
12-10-74	Filed indictment.
12-23-74	Deft. (no atty.) Court directs entry of not guilty plea. Motions returnable in 10 days. Bail fixed at $5,000. P.R.B. Deft. ordered photographed and fingerprinted. Case assigned to Judge Wyatt for all purposes. Carter, J.
12-23-74	Filed unsecured P.R.B. in the sum of $5,000.00 acknowledged by the Clerk.
1- 6-75	Deft. not present. Bench Warrant Ordered. . . . Wyatt, J.
1- 6-75	Bench Warrant Issued.
1- 7-75	Deft. present. B/W vacated. Deft. continued on $5,000 P.R.B. Trial March 3, 1975 9:30 A.M. . . . Wyatt, J.
2-25-75	Filed Deft's. pro se motion for suppression of evidence.
2-28-75	Hearing held on motion to suppress & concluded. . . . Wyatt, J.

Docket Entries

Date	*Proceedings*
2-28-75	Filed MEMO ENDORSED on deft's. motion for suppression of evidence, filed 2-25-75. After hearing on this date, the within motion to suppress is denied. SO ORDERED. . . . Wyatt, J. (mailed notice)
3- 5-75	Filed Govt's. requests to charge.
3- 5-75	Filed Govt's. requests for the voir dire.
3- 5-75	Filed Govt's. memorandum of law in opposition to deft's. motion to suppress.
3- 3-75	Trial begun with a jury. Deft. appears Pro Se.
3- 4-75	Trial continued & concluded. Jury finds the deft. not guilty on count 1 and guilty on count 2. Sentence April 11, 1975, Bail continued. Pre-sentence investigation ordered. . . . Wyatt, J.
3- 7-75	Filed deft's. (Pro Se) motion for a judgment of acquittal or for a new trial.
3- 7-75	Filed MEMO ENDORSED on deft's. motion for a judgment of acquittal or for a new trial. The motion is in all respects denied. SO ORDERED. . . . Wyatt, J. (mailed notice).
3-12-75	Filed Deft's. (Pro Se) motion for a judgment of acquittal.
3-14-75	Filed MEMO ENDORSED on deft's. motion filed 3-12-75. This communication is treated as a motion for judgment of acquittal (Fed. R. Crim. P. 29(c)) and is denied. SO ORDERED. . . .Wyatt, J. (notice mailed by Pro Se Clerk.)
4-11-75	Sentence adjourned to 4-18-75 at 2:30 P.M. . . . Wyatt, J.

Docket Entries

Date	*Proceedings*
4-18-75	Filed Judgment & Commitment (without counsel) The Deft. is hereby committed to the custody of the Atty. Gen. or his authorized representative for imprisonment on Count Two (2), pursuant to Sec. 4208(b) T. 18 U.S. Code for study, report & recommendation as described in Sec. 4208(c). This commitment is deemed to be for the maximum sentence prescribed by law to Five (5) Years & a FINE of $5,000.00 unless altered pursuant to said section upon receipt of report & recommendation. The recommendation which the Director of Prisons believes would be helpful in determining the disposition of the case, shall be furnished to the Court within Three (3) Months, unless the Court grants time, not to exceed an additional three months, for further study. Deft. continued on bail pending appeal. Wyatt, J. Issued commitment 4/22/75.
4-18-75	Filed deft's. notice of appeal from the Judgment of 4-18-75 and MEMO ENDORSED—Leave to proceed on appeal in forma pauperis. Granted. SO ORDERED. . . . Wyatt, J. Mailed copies to John Flynn, 8306 Vietor Ave., Elmhurst, Queens, N.Y. 11373 and U.S. Attorney's Office.
5- 6-75	Filed notice of certification & transmittal of the record on appeal to the U.S.C.A.
6-11-75	Filed notice of certification & transmittal of the record on appeal to the U.S.C.A.
10-29-75	Filed Designation of Exhibits to be transmitted to U.S.C.A. (Designation submitted U.S. Govt.)
10- 9-75	Filed notice of certification & transmittal of the supplemental record on appeal to the U.S.C.A.

Indictment

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

74 Crim. 1157

UNITED STATES OF AMERICA

—v.—

JOHN FLYNN,

Defendant.

The Grand Jury charges:

1. From on or about the 2nd day of February, 1972, up to and including the date of the filing of this indictment, in the Southern District of New York and elsewhere, John Flynn, the defendant, and Priscilla Witt, named herein as a co-conspirator but not as a defendant, unlawfully, wilfully and knowingly did combine, conspire, confederate and agree together and with each other, and with others to the Grand Jury known and unknown, to commit an offense against the United States, to wit, a violation of Section 1503 of Title 18, United States Code.

2. It was part of said conspiracy that the defendant unlawfully, wilfully, knowingly and corruptly would endeavor to influence, intimidate, and impede Kathryn Ann McGrath, a witness in the case of *United States* v. *McGrath, Lynch, Warshaw and Hannesson*, 72 Cr. 146, then pending in the United States District Court for the Eastern District of New York, in the discharge of her duty as a witness, by endeavoring to cause the said Kathryn Ann McGrath to testify falsely or to refuse to testify.

OVERT ACTS

In furtherance of said conspiracy, the following overt acts, among others, were committed in the Southern District of New York:

1. On or about the 15th day of February, 1972, Priscilla Witt and Kathryn Ann McGrath had a conversation;

2. On or about the 31st day of March, 1972, John Flynn, the defendant, met Kathryn Ann McGrath at the corner of Houston and Thompson Streets in New York City;

3. On or about the 6th day of April, 1972, John Flynn, the defendant, met Kathryn Ann McGrath near the corner of 10th Street and Sixth Avenue in New York City.

(Title 18, United States Code, Section 371.)

COUNT TWO

The Grand Jury further charges:

From on or about the 2nd day of February, 1972, up to and including the date of the filing of this indictment, in the Southern District of New York and elsewhere, John Flynn, the defendant, unlawfully, wilfully, knowingly and corruptly did endeavor to influence, intimidate and impede Kathryn Ann McGrath, a witness in the case of *United States* v. *McGrath, Lynch, Warshaw and Hannesson*, 72 Cr. 146, then pending in the United States District Court for the Eastern District of New York, in the discharge of her duty as a witness, by endeavoring to cause the said Kathryn Ann McGrath to testify falsely or to refuse to testify.

(Title 18, United States Code, Section 1503).

PAUL J. CURRAN
United States Attorney

LOUIS J. FERULLO
Deputy Foreman

★ U. S. Government Printing Office 1975— 614—350—584

AFFIDAVIT OF MAILING

STATE OF NEW YORK)
) ss.:
COUNTY OF NEW YORK)

Jeremy G. Epstein, being duly sworn, deposes and says that he is employed in the office of the United States Attorney for the Southern District of New York.

That on the 5th day of November, 1975 he served 2 copies of the within brief by placing the same in a properly postpaid franked envelope addressed:

John Flynn
83-06 Victor Avenue
Elmhurst, Queens, New York

And deponent further says that he sealed the said envelope and placed the same in the mail drop for mailing at the United States Courthouse, Foley Square, Borough of Manhattan, City of New York.

Jeremy G. Epstein

Sworn to before me this
6th day of November, 1975

MICHAEL D. MORASSE
Notary Public, State of N
No. 31-8[illegible]
Qualified in New Y
Commission Expires

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